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When the right of action is of such a nature as not to be the subject of a contract, as in the case of a violation of a personal or a relative right, it cannot be assigned. The action can only be maintained by the party who has been injured, and when he dies the right of action also dies. Every right of action involving life, health or reputation, belongs to this class. So a right of action founded upon a breach of promise of marriage, being in the nature of a personal injury, cannot be transferred. On the other hand, where the injury affects the estate rather than the person, where the action is brought for damage to the estate, and not for personal suffering, the right of action may be bought and sold. Such a right of action upon the death, bankruptcy or insolvency of the party injured, passes to the executor or assignee as a part of the assets, because it affects his estate, and not his personal or relative rights. Of course such a right of action is assignable, and under the provisions of the code, the assignee is the proper party to maintain action upon it:" *People v. Tioga Common Pleas*, 19 Wend. 73; *Robinson v. Weeks*, 6 How. Pr. 161; *Chamberlain v. Williamson*, 2 M. & S. 408; *Flynn v. Hudson River Rd. Co.*, 6 How. Pr. 308;

Comegys v. Vasse, 1 Pet. 213; and 1 Chit. Pl. 68, are cited by the court to sustain the rules above stated. See also *Final v. Backus*, 18 Mich. 218; *Grant v. Smith*, 26 Id. 201; *Brady v. Whitney*, 24 Id. 154.

Section 2525 of the Iowa Code provides that "all causes of action shall survive and may be brought, notwithstanding the death of the person entitled or liable to the same." See the rule applied in *Shafer v. Grimes*, 23 Ia. 550 (an action for seduction); *Carson v. McFadden*, 10 Id. 91 (an action for libel); *McKinlay v. McGregor*, Id. 111 (injury to the person by decedent).

From what has been already said, and from the above cited statute it seems clear that in Iowa, contrary to the general rule, causes of action for tort whether to the person, which at common law died with the person, or to property, are assignable; and since by the code, sect. 2543, "every action must be prosecuted in the name of the real party in interest, except as provided in the next section," which does not affect the question, it seems equally clear that the action was correctly brought in the name of the assignee.

MARSHALL D. EWELL.

Chicago.

Supreme Court of Pennsylvania.

WEST PHILADELPHIA PASSENGER RAILWAY CO. v. GALLAGHER.

It is not contributory negligence *per se* for a passenger to ride on the lower step of the front platform of a crowded street-car without objection by the driver or conductor.

A boy of fourteen got upon the lower step of the front platform of a crowded street-car, and rode for a long distance as a passenger, holding on with but one hand. He was finally knocked off by the jolting of the car, run over and injured. In an action against the street-car company to recover damages: *Held*, that the questions of negligence and contributory negligence, taking into consideration the age and capacity of the lad, were both for the jury.

The absence of a guard or fender on the front platform of a street-car is a fact

which may be taken into consideration with other facts in determining the question of the company's negligence. The court will not, however, say, as matter of law, that it is negligence on the part of the company not to furnish such a guard.

ERROR to the Common Pleas No. 4, of Philadelphia County.

Case, by James S. Gallagher, a minor, by his next friend Rudolph Steinle, against the West Philadelphia Passenger Railway Company, to recover damages for personal injuries, caused by the alleged negligence of the company defendant. Plea, not guilty.

On the trial, the following facts appeared :—

The plaintiff, a boy of thirteen years, got on a car of the defendant company, which was very much crowded. He took a position on the lower step of the front platform, holding on by only one hand, with his left foot on the step, and the right one on the platform ; in this position he rode for twenty-two squares with safety, but when near his destination lost or let go his hold, and losing his balance, on reaching the ground fell, so that his leg got under the wheel, was crushed, and necessarily had to be amputated near the knee-joint. The car was a two-horse one, and the driver collected the fares. It had no guard or fender to the front platform, and at the time of the accident was travelling at a rapid speed over a portion of the road on the down grade, which made the car rock ; the testimony of plaintiff's witnesses was to the effect that the car was going no faster than ordinarily for that part of the road in the open country, and that while the car rocked, it was the usual rocking motion at that rate of speed.

The court below left it to the jury to say whether the boy had sufficient knowledge and discretion to understand the danger he assumed, and whether he assumed that danger voluntarily. The court also charged that if the boy was pushed off by the ordinary pressure of a crowd of passengers, or the efforts of the passenger to get off, that being the usual and ordinary pressure that might be expected in a crowded car, then the company would be liable as having omitted the precautions that a company ought to take to protect its passengers situated as this boy was. The court further charged that while it had not been established as matter of law that it was the duty of a railway company to put gates on the front platforms, the omission to do so was a fact to be taken into consideration by the jury, and if they were of opinion that a gate or fender would have prevented the accident, they were at liberty to say that the company was careless in omitting to have it.

Verdict for plaintiff for \$8000, and judgment thereon. Whereupon defendant took this writ, assigning for error, *inter alia*, that portion of the charge above cited.

Rufus E. Shapley, for plaintiff in error.

L. C. Cleeman and Pierce Archer, for defendant in error.

The opinion of the court was delivered by

TRUNKY, J.—There is little conflict of testimony respecting the number of passengers on the car at the time the plaintiff was hurt. The person who acted as conductor says there were between forty-five and fifty, eight or nine of whom were on the front platform. Passengers, whether called by the plaintiff or defendant, agree that the car was crowded, and that more might have got on; the conductor thinks he could have shoved on seventy, and then it would have been pretty well packed. He also testifies that eight or ten boys were on the car, and that he saw none of them standing on the step of the front platform, nor on the platform itself, except in the door. While the car ran from Forty-first street to Sixty-second, the plaintiff stood on one of the front steps, and either the crowd or something else kept him from the conductor's view. Had the conductor seen him he might have considered it his duty, under the rules of the company, to have placed him in a position of greater safety. It appears that the rocking motion of the cars was increased by the platforms being loaded with passengers; also that the car at the time of the accident was running down grade, quite as fast as the usual rate of speed when the passengers could all be seated. One of the witnesses, who had been a driver on that road, says the rocking was not unusual with a loaded car, but was unusual with a car not so heavily loaded. The front platform was without gates or fenders. The plaintiff was nearly thirteen years and two months old.

The fact that the front platform was not enclosed with a screen or fender is a matter proper to be considered, with other facts in the case, in determining whether or not the defendant was guilty of negligence in allowing the front door to remain open, and the front platform to be crowded with passengers, some of whom were children. It was the duty of the defendant to exercise reasonable care and vigilance to carry the plaintiff safely. If on account of the plaintiff's age and inexperience, he was incapable of taking pro-

per care of himself, the defendant was bound to exercise the high care and vigilance necessary and proper to secure his safety: *Phila. City Pass. Ry. Co. v. Hassard*, 75 Penn. St. 367. These principles apply to the duty of passenger railway companies in relation to passengers, and are not militated by rulings in cases where children got on or attempted to get on the front platform under circumstances which, had they been of mature age, would have shown them both trespassing and negligent, and which showed no negligence on the part of the companies.

There is no absolute rule as to what constitutes negligence. Where a higher degree of care is demanded under some circumstances than under others, when the standard shifts with the circumstances of the case, when both the duty and the extent of its performance are to be ascertained as facts, a jury alone can determine what is negligence and whether it has been proven: *Crissey v. Railway Co.*, 75 Penn. St. 83. Where concurrent negligence is alleged, a child will not be held to the exercise of the same degree of care and discretion as an adult. The law does not presume that an infant is responsible for negligence until after he arrives at fourteen years of age: *Nagle v. Railroad Co.*, 88 Penn. St. 35.

It has been ruled in this and other states that it is not negligence *per se* for a passenger to ride on the front platform of a crowded car with consent of the driver or conductor. Why should negligence be imputed to him? The railway companies invite passengers to get on, receive the fare, and thus hold out the platform as a safe place for passengers. That it is as safe as the inside of the car nobody pretends. But the carrier who receives the passenger and the compensation for carrying him, does not allege contributory negligence in the passenger for taking the place provided; he alleges that the place is safe with due care and vigilance. Then the carrier is bound to higher care and vigilance when the platform is crowded with passengers, in proportion as that place is more dangerous than a seat inside the car. And the passenger on his part must exercise proper care under the particular circumstances. A boy may have much intelligence and discretion for one of his age, and still should not be held to the measure of care that ought to be exercised by a man of ordinary judgment.

When the evidence warrants a finding that the passenger, a boy, rode two miles on the step of the front platform without having been seen by the conductor, the platform full of passengers, the car

going at the usual speed of one not overloaded, and the rocking motion so great as to attract the attention of numerous passengers, the case is one for the jury to determine whether the company exercised due care under the circumstances. And this aside from the testimony of the boy himself respecting the pushing or jostling against him by the crowd from the time he got on the car until his fall. But his testimony was for the consideration of the jury. The learned judge of the Common Pleas committed no error in refusing to charge that "upon the whole evidence in this case the verdict must be for the defendant."

With a single exception, we are of opinion that the defendant (plaintiff in error) has no ground to complain of the rulings of the court below, and that exception is the instruction set out in the third assignment, which must be sustained. After stating that it has been ruled that the absence of gates, or fenders, or screens is a fact to be taken into the consideration by the jury in determining the question of negligence on the part of the defendant, the court charged: "If, therefore, you are of opinion that a fender or guard put upon that car, or, if upon that car on that day, would have prevented this accident, and that there was no guard or fender there, then you are at liberty to say that the company was careless in omitting to have it. I refer it to the jury to say as a matter of fact whether the absence of a guard contributed in any way to the injury of the plaintiff. I refer that fact to you to determine."

No guard was there or claimed to have been there. Had one been on the platform, likely it would have prevented the accident. Its absence was a fact to be considered, with other facts in the case, in determining what care and vigilance the defendant ought to have exercised. Were the platform so guarded that it would be as safe to ride there as inside, there would be no call for greater care when occupied by passengers. The instruction to the jury was, that if they were of opinion that a fender or guard on the platform would have prevented the accident, they were at liberty to say the company was careless in omitting to have it. If the company was careless by reason of that omission, the omission was negligence, and it was the duty of the company to have placed the guard on the platform. The instruction was the equivalent of saying, as a matter of law, that it was the duty of the company to have the platform guarded by a fender or screen. Unless such was their duty, the

jury were not at liberty to say the company was careless by omitting to have the platform guarded. The absence of gates or screens is as patent to the passenger as to the carrier. Neither the street railway companies nor the public have deemed the platforms so unsafe that a man of ordinary prudence would not ride thereon when the car is full inside. The court will not say, as a matter of law, that it is in itself negligence in the carrier not to place a guard on the platform of a horse car, or in a passenger to stand on the open platform: *Germantown Pass. Ry. v. Walling*, 97 Penn. St. 55.

Judgment reversed and a *venire facias de novo* awarded.

The second point, of the principal case, viz., that it is not contributory negligence *per se* for a passenger to ride upon a platform of a street railway car, is in perfect accord with the prevailing rule, yet there is some apparent conflict in the cases, which it is the purpose of this note to consider.

The rule is universal, that if a plaintiff contributes to his own injury he cannot recover therefor, although the negligence of the other party is extremely great. The law demands that every person shall provide for his own safety. The situation in which he is placed is the criterion by which his responsibility is to be determined. Thus the "reasonable care," which every person is required to exercise, is aptly termed "a varying circumstance": 5 Southern L. Review (N. S.) 843; *North Cent. Rd. v. Price*, 29 Md. 420; *McClurg's App.*, 56 Penn. St. 294; *Lynch v. Nurdin*, 1 Q. B. 36.

The degree of care to be exercised by street-car passengers is designated as "ordinary," and what is meant by "ordinary" is sometimes difficult of solution. As it is "a varying circumstance," it is not absolute, but depends upon the existence of the accompanying facts of each particular case: 20 Cent. L. J. 104.

It has been held that the degree of care to be exercised in riding upon a street-car is not so great to make it ordinary as that required in riding upon a railway train drawn by locomotive power: *Meesel v. Lynn & Boston Rd.*, 8 Allen (Mass.) 234; *Gavett v. Manchester &*

Lawrence Rd., 16 Gray (Mass.) 501. See also Thompson on Car. of Pass. 444, § 6.

In *Huelsenkamp v. Citizens' Rd.*, 34 Mo. 45, s. c. 37 Mo. 537, the car was full on the inside, on both platforms and on the steps. The party who received the injury, for which the suit was brought, was standing on the bottom, rear step, holding on to the iron railing of the window of the car, with his body leaning out a considerable distance from the car, and when in such situation, in passing another car, stationary upon a short track, commonly called a "turn out," the cars came so near together that his body was crushed between them, which caused his death almost instantly. It was after dark when the injury happened. The cars were not so near together but that one could pass the other without collision. The deceased was warned of his dangerous position by other passengers, and that he had better get off the car or get in further. This was held not to be such negligence as to justify a court in taking the case from the jury. The court, said: "The position in which the deceased placed himself was perhaps unsafe, but it was not prohibited; and the evidence further shows, that owing to the crowded state of the cars, there was no other place he could take. Had there been any objection to carrying him in that manner, it would have been competent for the company or its employees to have put him off the car; but not having done so, they were bound to carry him with skill,

prudence and care. There is nothing to show that he failed to exercise ordinary prudence and care. He might in all probability have avoided the catastrophe by being on the alert and exercising ordinary vigilance, but such was not required of him."

In *Ginna v. Second Avenue Rd.*, 67 N. Y. 596, it is held that when a street-car is so crowded that one taking passage cannot enter it without unreasonable discomfort to himself and his fellow passengers, and the conductor consents to his riding on the platform and accepts from him the usual fare while there, and such passenger is thrown off and injured through the negligence of the company, the mere fact of his being on the platform does not *per se* constitute contributory negligence, but is a question for the jury.

In *Nolan v. Brooklyn & Newton Rd.*, 87 N. Y. 63, the plaintiff stood upon the front platform smoking, because, as he testified, it was the custom of the line to permit smoking there, but not elsewhere. There were no vacant seats inside. While upon the platform, the conductor took his fare, and the driver suddenly and without warning to any one whipped one of his horses, who plunged under the blows, caused a jar, and threw the plaintiff off the car. The driver attempted to stop the car, but the brake-chain being out of order, he failed, and the plaintiff was run over and injured. The question of the plaintiff's contributory negligence was submitted to the jury. The company had a rule posted on its cars, forbidding passengers from getting on and off the cars while in motion, "or on or off the platform." It was held that this did not relieve the company from responsibility. The court said: "This rule does not forbid riding on the front platform. It is the getting on or getting off from that part of the car which is forbidden; evidently because a misstep or an accidental fall would there be more dangerous than at the rear platform. But once on not a word of

warning is uttered against remaining and riding there."

In *Germantown Pass. Ry. v. Walling*, 97 Penn. St. 55; s. c. 2 Am. & Eng. Railroad Cases 20; the deceased hailed a crowded passenger car, and the driver stopped. He first went to the rear platform but could not get on by reason of the crowd; he then went to the front platform which was also crowded, but succeeded in getting on the step, on which there were already two persons. In turning a curve, several passengers pushed against the deceased which caused him to break his hold from the hand rails, and he fell under the car and was killed. The court, in affirming the judgment of the lower court, held that the question whether the deceased was guilty of contributory negligence, was properly submitted to the jury. In this case the court said: "Street-car companies have all along considered their platforms a place of safety, and so have the public; shall a court say that riding on a platform is so dangerous, that one who pays for standing there can recover nothing for an injury arising from the company's default? * * * Standing on the front platform of the horse-car when there is room inside, is not conclusive evidence that the person injured by the driver's default was not exercising due care: *Maguire v. Middlesex Rd.*, 115 Mass. 239. A street car company has the right to carry passengers on the platforms, and if a passenger be injured while standing there without objection of the company's agent, whether the injury was with his contributory negligence is for the jury to decide, under all the facts and circumstances detailed in evidence."

In *Hadencamp v. Second Avenue Rd.*, 1 Sweeney (N. Y. Superior Ct.) 490, the plaintiff was received as a passenger and his fare taken, there being no room inside, he was permitted to remain on the front platform, and while there he was injured. It was held that he was not guilty of contributory negligence.

In *Meesel v. Lynn & Boston Rd.*, 8 Allen (Mass.) 234, the court said: "It is well known that the highest speed of a horse railroad car is very moderate, and the driver easily controls it, stops the car by means of his voice, his reins and his brake. In turning round an angle, from one street to another, passengers are not required to expect that he will drive at a rapid rate, but on the contrary, might reasonably expect a careful driver to slacken his speed. The seats on the inside are not the only places where the managers expect passengers to remain; but it is notorious that they stop habitually to receive passengers to stand inside till the car is full, and then to stand on the platforms till they are full, and continue to stop and receive them, even after there is no place to stand, except on the steps of the platforms. Neither the officers of the corporations, nor the managers of the cars, nor the travelling public, seem to regard this practice as hazardous, nor does experience thus far seem to require that it should be restrained on account of its danger." See further *Thirteenth & Fifteenth St. Pass. Rd. v. Boudrou*, 92 Penn. St. 475; s. c. 37 Am. Rep. 707, with note; *Sheridan v. Brooklyn & N. Rd.*, 36 N. Y. 39; *Clark v. Eighth Av. Rd.*, Id. 135; s. c. 32 Barb. 657; *Augusta & Sumnerville Rd. v. Reng*, 55 Ga. 126.

A number of cases have held that where a passenger rides upon the platform without absolute necessity, as where the seats are all taken, but there is standing room within the car, it is not contributory negligence *per se*, but is a question for the jury. Such position may be a condition without being a cause of the injury, as where a passenger riding on the rear platform is struck by the pole of the following car, as in *Thirteenth & Fifteenth Pass. Rd. v. Boudrou*, 92 Penn. St. 475; s. c. 37 Am. Rep. 710.

In *Burns v. Bellefontaine Rd. of St. Louis*, 50 Mo. 139, the plaintiff stood upon the front platform when there was

room inside. This was held not to be negligence in itself. The court said the company had a right to carry passengers there, and if a passenger was injured while standing there without objection by the company's servants, whether it was with his contributory negligence is for the jury to decide. See *Thompson on Car. of Pass.*, p. 441, where this case is reported in full.

But *Andrews v. Rd.*, 2 Mackey (S.C. Dist. Columbia) 137; s. c. 15 Reporter 330, seems to be in conflict with the last case. Here the plaintiff entered the car from the rear, to put his fare in the box, the car being what is known as a "bob-tail." He remained on the platform for some time; the seats were all taken, but there was ample standing room inside, and straps pendent from the roof for passengers to hold by. He had one foot on the platform and the other in the door of the car, when, on turning a corner, the car "produced a jar," and he was thrown off and seriously injured. This was held *per se* negligence. But this ruling cannot be considered sound law.

A passenger may ride in such a manner upon the platform, so that he will be chargeable with contributory negligence. Thus, in the recent case of *Downey v. Hendrie*, 46 Mich. 498, the plaintiff was sitting on the driving bar of the front platform of the car, by the invitation of the driver, from which position he fell and was injured. There was ample room within the car, both standing and seating. It was contended that as the plaintiff was invited to ride on the front platform by the defendant's servant, therefore the company was estopped from setting up the plaintiff's situation as contributory negligence.

While this was acknowledged to be a rule of law by the court, it was said, "the rule is plainly not one of universal application. Regard must be had to the passenger's capacity to look out for himself; the opportunity there may be to get

a safer position; to the distinctness, certainty and extent, or degree of the peril, and so on." "May the ordinary person," said the court, "with his eyes open and with abundant accommodations before him, which are safe, accept an invitation from the carrier to ride on the cow-catcher, and then, if injury arises from it, be allowed to set up the invitation as a legal answer to the charge of contributory negligence? To conclude that he might would be to permit a person of full capacity to exempt himself from the duty and responsibility appertaining to him as a moral being, and in substance to stultify himself in order to cast a liability on another." Judges cannot denude themselves of the knowledge of the incidents of railway traveling, which is common to us all:" *Lake Shore & Mich. Rd. v. Miller*, 25 Mich. 274; *Siner v. Great Western Rd.*, L. R., 4 Ex. 123; *Dublin, Wicklow & Wexford Rd. v. Slattery*, 3 App. Cases 1155; s. c. 10 Ir. Rep. 256; 24 Eng. 713.

If the passenger sits on the steps of the front platform, against the warning of the conductor, without making an

effort to secure himself by holding on to the railing, he will be deemed guilty of contributory negligence, and cannot recover, if injured: *Wills v. Lynn & Boston Rd.*, 129 Mass. 351.

In *Ward v. Central Park Rd.*, 33 N. Y. 392; s. c. 11 Abb. Prac. Rep. (N. S.) 411; s. c. 42 How. Pr. 289, the plaintiff was standing on the edge of the rear platform of the defendant's car; and was thrown off and injured. He made no effort to hold on. He was not permitted to recover.

The recent case of *Heckrott v. Buffalo St. Rd.*, Superior Ct. Buffalo, 13 Am. Law Record 295, is interesting, and contains a thorough review of the cases. Here the plaintiff took passage on the defendants' car, he standing on the front platform, with his foot on the iron rod near the dash-rail, and his back against the window, from which position he fell off the car and was injured. In an action against the company it was held that he could not recover, as his situation was the proximate cause of the injury.

B. E. BLACK.

San Jose, Cal.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF ILLINOIS.¹

COURT OF ERRORS AND APPEALS OF MARYLAND.²

SUPREME COURT OF NEW JERSEY.³

SUPREME COURT OF VERMONT.⁴

SUPREME COURT OF WISCONSIN.⁵

ACTION. See *Husband and Wife*.

AGENT. See *Insurance*.

Illegal Transaction—Estoppel.—An agent who receives money for his principal upon a contract not criminal or immoral in its character, but

¹ From Hon. N. L. Freeman, Reporter; to appear in 113 Ill. Rep.

² From J. Shaaff Stockett, Esq., Reporter; to appear in 63 Md. Rep.

³ From G. D. W. Vroom, Esq., Reporter; to appear in 18 Vroom.

⁴ From Edwin L. Palmer, Esq., Reporter; to appear in 57 Vt. Rep.

⁵ From F. K. Conover, Esq., Rep.; will probably appear in 63 or 64 Wis. Rep.